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Telehealth compliance after the public health emergency

by David G. Lazarus, Jeffrey A. Smagula, and Alicia M. Siani

Nearly three years have passed since the federal government initially declared a public health emergency (PHE) in response to COVID-19. Since then, telehealth utilization has soared largely due to new regulatory flexibility. Polls suggest that approximately one-third of Americans have tried telehealth, with 15% having used telehealth for the first time during the pandemic.^[1] In 2021—a peak period in telehealth utilization—more than 2 in 5 Medicare beneficiaries used telehealth, representing an 88-fold increase in utilization of services from the prior year.^[2] Nationwide claims data shows telehealth utilization rose to 4.9% of all medical claim lines in December 2021.^[3] Patients report satisfaction with the health services provided, indicating they will continue to use telehealth services post-pandemic.^[4]

Healthcare providers, including U.S. hospitals, medical practices, imaging centers/office-based labs, and urgent care facilities are investing in telehealth infrastructure to meet patient demand and expectations. Similarly, health plans and employer groups are expanding offerings and contracting with telehealth-enabled provider groups and telehealth vendors.

Though telehealth has emerged as a more accepted and often expected mode of healthcare delivery, the COVID-related regulatory flexibility that spurred the adoption of telehealth may disappear without legislation (or Executive) intervention at the expiration of the current federal PHE. At the same time, the U.S. Congress, U.S. Department of Justice (DOJ), and U.S. Department of Health & Human Services (HHS) have signaled that increased scrutiny of telehealth policies and related enforcement actions is forthcoming.^[5] This article analyzes the status of telehealth waivers and policies that have contributed to the expansion of telehealth and identifies practical approaches to regulatory compliance for healthcare practitioners.

When will the federal PHE end?

The federal government and states each adopted a multitude of temporary policies designed to increase access to telehealth services in response to the COVID-19 pandemic. These policies ranged from broadening the patient population eligible to receive telehealth services^[6] to increasing reimbursement for telehealth services.^[7] In

addition, healthcare practitioners have benefitted from relaxed enforcement of certain licensing and regulatory requirements, such as federal HIPAA requirements.^[8]

As of the writing of this article, many state-based PHEs have ended, eliminating various state-specific telehealth waivers or relaxed policies. This includes policies that permitted out-of-state physicians who did not have a medical license for a particular state to nevertheless provide telehealth services to in-state residents. For example, the expiration of Hawaii's, Idaho's, and Iowa's respective PHEs also terminated the states' waivers or temporary permits which allowed out-of-state providers to practice telemedicine or telehealth in the state without a state medical license.^[9]

The end date of the federal PHE remains unknown, however. On October 13, 2022, HHS Secretary Xavier Becerra once again extended the PHE for another 90 days through January 11, 2023.^[10] Whether the federal government will continue to extend the PHE beyond January is yet to be determined. HHS has repeatedly committed to providing a 60-day notice prior to the termination or expiration of the PHE.^[11] If the Administration does not provide such notice by mid-November, we can expect that the PHE will be extended again through early April 2023.

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